Perspectives from FSF Scholars
November 7, 2025
Vol. 20, No. 44

The Public Interest Standard: The Historical Legislative Context

by

Randolph J. May *

There's no doubt the Communications Act needs substantial updating, and there's an obvious place to start. Eliminate the Federal Communications Commission's ubiquitous authority to regulate media and telecommunications companies in "the public interest."

It's not difficult to understand how this essentially malleable public interest standard may be used to expand the FCC's power or be abused, including by extracting so-called "voluntary concessions" from those seeking the agency's approval for transactions. Often these concessions, secured in the context of applicants seeking agency approval for pending transactions, bear little or no relationship to the actual merits of the specific transactions.

This is why, for almost two decades now, Free State Foundation scholars have been advocating that any meaningful updating of the Communications Act must include replacement of the public interest standard with one oriented towards a proper assessment of consumer welfare and marketplace competition. [See a few Selected Readings at the end of this *Perspectives*.] And it's why, with the FCC's public interest standard much in the news these days, especially regarding the agency's invoking it to regulate the content of programming, it's an important time for us to continue to do so.

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

Here are two recent pieces on the subject: "Congress Should Eliminate the FCC's Public Interest Authority" and "Brendan Carr Should Back Off." As you know if you are familiar with the FCC's history, or you'll learn if you read these pieces, both Democrat and Republican-controlled FCCs have abused the agency's public interest authority, with Democrats doing so more frequently.

In this piece, I want to provide some historical context for the FCC for those who may not be familiar with it. But first, summon visions in your mind's eye of all the various technologies and electronic platforms available today to satisfy our nearly insatiable media and telecommunications demands. Your mind might wander among radio and television stations, satellite TV and radio channels, cable TV and fiber optic systems, smartphones and fixed wireless operators. Oh, and don't forget the Internet platform!

Think about all the services and applications delivered over those various distribution platforms that, depending on the circumstances, both complement each other and compete. Hundreds of radio and TV channels; hundreds of streaming video networks and programs; tens of thousands of podcasts and blogs; landline voice telephony, cellphone calls, and smartphone apps; SMS texting and various other messaging capabilities; chatbots powered by AI; and enormous data transmission offerings.

Of course, not every person or entity has access to all these services and applications to the same degree in all places. But only a grinch would argue that we don't live in an age of media and telecommunications abundance in which access to countless diverse sources of news, information, and entertainment is available to all Americans.

This is what the Digital Age broadband delivery has wrought.

Now go back with me to the late nineteenth and early twentieth centuries. That's when the basic laws were adopted by Congress that still largely govern our nation's telecommunications networks and media outlets. Indeed, two of the most important parts of the current Communications Act of 1934, which created the FCC, are derived, without meaningful change, from these statutes conceived more than a century ago.

The main parts of Title II of the Communications Act, designated "Common Carriers," are lifted almost verbatim from the federal Interstate Commerce Act of 1887, which created the Interstate Commerce Commission and classified the nation's burgeoning railroads as common carriers. The ICC was given power to control rates, terms, and conditions of service. Importantly for present purposes, the Mann-Elkins Act of 1910, expanded the ICC's jurisdiction to include regulation of telephone and telegraph companies as common carriers. And the Transportation Act of 1920 further revised the Interstate Commerce Act to provide that no railroad be allowed to enter or exit the market, or acquire or merge with another carrier, except on a finding by the ICC that the "public convenience and necessity" would be served.

The primary justification for designating the railroads, and then later telephone and telegraph companies, as common carriers, and for regulating their rates, terms, and conditions of service, along with their entry and exit from the market, was economic – that is, to subject to government control what was considered to be firms' monopolistic power.

Principal parts of Title III of the Communications Act, designated "Provisions Related to Radio," were lifted almost verbatim from the Radio Act of 1927. A central feature of that 1927 law was delegating to the new Federal Radio Commission the authority to grant licenses to radio broadcasters requiring that their stations be operated consistent with the "public interest, convenience, and necessity." A principal justification for licensing broadcasters and subjecting them to "public interest" regulation was the claimed scarcity of radio frequencies. Congress concluded that the government should parcel out the channel assignments and ensure that those granted licenses use this supposedly scarce public resource in the public interest.

Today – more than a century after the adoption of the relevant statutes – the Communications Act continues to subject both radio and TV broadcasters and other users of the spectrum and common carriers to regulation by the FCC in the "public interest." While the economic justifications for reliance on "public interest" regulation may have been more persuasive (although nevertheless, in my view, still problematic) a century ago when the laws were adopted, they no longer are.

The simple fact is that the public interest standard grants FCC officials too much unconstrained discretion in today's competitive media and telecommunications environment. Today, reliance on the dictates of competitive marketplace forces is much more likely to enhance consumer welfare – and to be consistent with constitutional free speech and due process dictates – than reliance on immodest bureaucratic diktats, even well-intentioned ones.

Now think again about the radical marketplace changes in the media and telecommunications environment since the governing statutes were adopted over a century ago that were incorporated into what became the Communications Act of 1934. That's why it's time for Congress to jettison the public interest standard in favor of a consumer welfare or competition standard as part of a project to modernize our basic communications law.

* Randolph J. May is President of the Free State Foundation, a free market-oriented think tank in Potomac, MD. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it.

Selected Readings

Randolph J. May, "Any Volunteers," *Legal Times*, March 6, 2000.

Randolph J. May, "The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?," *Federal Communications Law Journal*, May 2001.

Randolph J. May, "A Modest Plea for Modesty Regarding the Public Interest Standard," *Administrative Law Review*, Fall 2008.

Randolph J. May, "Adopting Rebuttable Presumptions at the FCC," *The Regulatory Review*, January 2019.

Randolph J. May, "Congress Should Eliminate the FCC's Public Interest Authority," *The Regulatory Review*, October 2025.